UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

J. W. BELL *v.* THE JOS. JOSEPH & BROS. CO.

1. Removal of Causes—Petition—Time of Filing.—In a case removed under Sec. 29 Judicial Code, the requirement of the statute not having been waived by an act of the plaintiff, the time when a plea in abatement can be filed in the state court is the last day on which the petition for removal can be filed.

2. Pleading—Plea in Abatement—Time of Filing.—Under Sec. 3260, Va. Code of 1904, a plea in abatement can not be filed after conditional judgment.

3. Process—Time for Return—Unofficial Process-Server.—The day on which return of a writ of summons should regularly be made is the day to which it is made returnable and not on some later day during the rules, but a delay in returning the writ until some later day during the rules does not nullify the writ and the service. This rule is not changed by the fact that the service and return is made by an unofficial process-server.

4. Judgment—Return Showing Service Prerequisite to Conditional Judgment.—Until a return has been made showing service of the writ of summons plaintiff is not entitled to a conditional judgment.

5. Removal of Causes—Remand—Petition Filed too Late.—Where a petition for removal is filed too late the case will be remanded to the state court.

Duncan Drysdale, for plaintiff.
Easeley and Gannaway, for defendant.

H. C. MCDOWELL, J. This cause, which was removed to this court from the Corporation Court of the City of Lynchburg, comes up on a motion by the plaintiff to remand, and also on a motion by the defendant to quash the writ and return thereon and to dismiss the action. The record filed here does not show the proceedings at rules in the office of the clerk of the Corporation Court, but the omission does not seem of importance. The facts are as follows: On March 20th, 1918, the clerk of the Corporation Court issued a writ of summons, in the usual form, directed to the Sheriff of Norfolk County. The writ was made returnable to "rules to be holden * * * on the 3d Monday in April, 1918." Service was made (§§ 3224 and 3207 Code 1904) by an unofficial process-server and the return duly verified. The summons was served on March 22nd, on an agent of the defendant, an Ohio corporation. The return was verified on April 17th, 1918. The 3d Monday of April, 1918, was the 15th. It is agreed that the summons was not in fact filed in the clerk's office with the return and verification thereon until April

17th. The declaration is in the record, but its filing date is not shown. At the June, 1918, term the defendant appeared in court and moved to quash the writ. This motion was not decided until the July term, at which time it was overruled. At the September term, 1918, the defendant for the first time filed a petition for removal to this court. The Corporation Court, on the ground that the petition to remove was filed too late, declined to make an order of removal. The defendant thereafter had the transcript of record made and filed it here on September 14, 1918.

The contentions made by the defendant in the Corporation Court were that service was not made by an officer; was not made on an agent of the defendant in the city where the suit was brought; and that the process was void because not returned on or before the return day. Only the last point is here insisted upon. In other words the first two, entirely untenable, grounds of objection have been abandoned, and the original validity of the writ and of the service of the writ are conceded.

It seems to me that the petition for removal was filed too late. In a case removed under sec. 29 Judicial Code, the requirement of the statute not having been waived by any act of the plaintiff, the time when a plea in abatement can be filed in the state court is the last day on which the petition for removal can be filed. Martin *v.* Baltimore & Ohio R. Co., 151 U. S. 673, 687; Goldey *vs.* Morning News, 156 U. S. 518, 524-5; Powers *vs.* Chesapeake & Ohio R. Co., 169 U. S. 92, 98. In this state pleas in abatement cannot be filed after conditional judgment. Code 1904, § 3260. I am disposed to agree with Professor Lile that the day on which return of a writ of summons should regularly be made is the day to which it is made returnable. (5 Va. Law Register 490), and not on some later day during the rules. But I am referred to no authority supporting the assertion, and I see no good reason for thinking, that a delay in returning the writ nullifies the writ and the service. The returning of a writ of summons is a requirement that is not made in the interest of the defendant, but in the interest of the plaintiff. If the writ was not executed the defendant in theory knows nothing of the institution of the action; but the plaintiff is interested to know the fact in order that he may sue out an alias writ. If the writ was executed, the defendant in theory has a copy of the writ and he knows when, where, how and by whom the writ was served. He is, without waiting for the return, in position to take any step he is entitled to take. But the plaintiff, until a return has been made showing service, is not entitled to the conditional judgment. Hence in either case it is of prime importance to the plaintiff to have the return made and of none to the defendant. Because of the fact that the conditional judg-

ment cannot be taken until the rules following the belated return of the writ, the time for the defendant to plead in abatement is—if the defendant so desires—extended. But there is no enforced delay on the part of the defendant. The only enforced delay is that imposed on the plaintiff. Hence I can see no reason for holding that the delay in returning the writ here nullified the writ or the service.

As showing that delay in filing an executed writ of summons does not nullify the writ and the service, see §§ 901 and 3221 Code 1904. These statutory provisions for the return of process, *after the return day has passed,* are not reconcilable with the theory that a failure to make return on the return day nullifies either the writ or the service of the writ. Nor can I see that there is any difference in result where the process was served by an unofficial process-server. The statute which authorizes such service by implication gives to his return, if verified, the same effect as a return by an officer. The result of a delay in filing is consequently also the same.

The only effect of the delay in filing the writ and return of service here was that it postponed the time for plea in abatement to the 1st May rules (if the declaration was then filed) or to the 2nd May rules of the latest. The case was we know matured and on the court docket at the June term. It follows that the conditional judgment was entered not later than 2nd May rules and the Common order confirmed at the 1st June rules. The petition for removal therefore should have been filed, in order to be within the federal statute, not later than the 2nd May rules. As the petition was not filed until September, I can see no way to avoid remanding the case.

Note.

The point in the above case, which is of special interest to the profession, is as to the validity of process returned to rules on a Tuesday or Wednesday instead of on Monday.

It will be recalled that Sec. 3220 of the Code states "It shall be returnable, within ninety days after its date, to the court on the *first day* of a term, or in the clerk's office, to the first or third *Monday* in a month, or to the first day of any rules. * * *"

Prof. Lile in 5 Va. L. Reg. 490, says: "A question of practice in this State, which, we believe, has not been judicially settled, is whether original process may legally be served on Tuesday or Wednesday following the first Monday of the rules to which it is returnable. The practice is not uniform throughout the State. We have knowledge of two opposing decisions in the circuit courts—one to the effect that process to commence a suit may be served on the second or third rule day as well as on the first; and the other, that service during the rules is confined to the first day.

"The latter view seems to be the correct one. The statute (Va. Code, sec. 3220) prescribes that process 'shall be returnable within ninety days after its date, to the court on the first day of a term

or in the clerk's office to the first or third Monday in a month, or to the first day of any rules.'

"The same section further provides that process shall be issued before the rule day to which it is returnable, and 'may be executed on or before "that day"'—that is, on or before the first day of the term or rules. Section 3236 prescribes that 'rules shall be held on the first and third Mondays in every month. * * * The rules shall continue three days.'

"It is common to speak of the process as returnable to particular 'rules,' as if it were on its face so returnable, instead of to a particular day of the rules. But process so returnable—e. g. 'to first August rules'—would not be in conformity to the statute. It must on its face be returnable to the first day of the rules—not the second, not the third. Under the Code of 1873, it might have been returnable to any rule day (Va. Code 1873, ch. 166, Sec. 2); but the Code of 1887 alters this, and distinctly provides that it shall be returnable to the first rule day. It is scarcely logical to assert, that while the mandate of the Commonwealth to its officer, on the face of the writ, in plainest language, requires him to return it on one only of a particular series of days, he may, nevertheless, return it on some other day. If it must be 'returnable' on the first rule day, it must be 'returned' on that day. The fact that the rules continue three days, does not alter this conclusion. This will readily appear by considering that the same statute provides that process may be returnable to the first day of a term as the rules may continue three days, so the term may continue for weeks. If when lawfully returnable only to the first rule day, the process may be served on any day during the continuance of the rules, then it follows that if returnable to the first day of a term, it may be served on any day during the continuance of the term. Doubtless no one would contend for the latter proposition—that process summoning a defendant to appear on the first day of the term, may lawfully be served on the twentieth day of the term. If the service be improper in the latter case, it must equally be so in the former, where made on the second or the third rule day.

"A necessary corollary from this is, that the writ is improperly returned, if not returned on the first Monday or first day of the term.

"Since the provisions of section 3220, with respect to the issuance of process, are mandatory, and process not issued in accordance therewith is void (Noell *v.* Noell, 93 Va. 433), it must follow that it is equally mandatory with respect to service 'on or before the rule day, (i. e., Monday) to which it is returnable.'

"If it be asked what the purpose of the two succeeding rule days is, if not for service or return of process, the answer is ventured that the two succeeding rule days are afforded as grace to the defendant, for the purpose of preparing and filing his plea. The plaintiff is supposed to file his declaration on the rule day to which his process is returnable (section 3240)—which, as shown, is Monday or the first day of the term—when, for the first time, the defendant receives official information as to the precise character of the claim; and since he may desire to plead at the first rules, he is entitled to two days within which to consider and formulate his defense. The additional two days may also be for the benefit of the clerk in taking rules on pleadings filed and other official action required or permitted at rules."

Judge Burks in his Pleading and Practice 297, says: "If return-

able to rules it must be returnable to the first or third *Monday*" quoting Prof. Lile's article, supra, as authority.

While Judge McDowell agrees with Prof. Lile that a Monday is the day on which the return should regularly be made, his opinion is opposed to Prof. Lile's opinion when he holds that the return may be made on a Tuesday or Wednesday. This is clearly seen when it is noted in the quotation from Prof. Lile's article that he interprets the word "returnable" to mean "returned," and as a reason for his opinion states that the two succeeding rule days (Tuesday and Wednesday) may be afforded as grace to the defendant for the purpose of preparing and filing his plea or may also be for the benefit of the clerk in taking rules on pleadings filed, and other official action required and permitted at rules.

On the first proposition—that the two succeeding days are afforded as an opportunity for the defendant to prepare and file pleas, the question is without interest save as to pleas in abatement—for no other pleas need be filed at the first rules, and even as to pleas in abatement it is not necessary to file them at the first rules if the defendant takes the precaution to enter a special appearance at those rules. Burks' Pl. & Pr. 273. Judge McDowell, it would seem, has answered very fully Prof. Lile's suggestion when he states that "the plaintiff, until a return has been made showing service, is not entitled to the conditional judgment" and hence without any action on the part of the defendant the door remains open for pleas in abatement. Sec. 3260.

On the second proposition, that the two succeeding rule days are for the benefit of the clerk in taking rules, there seems to be no necessity that the clerk actually enter the rules on the rule days. He, theoretically, takes them on those days but in practice we find the clerk writing up his rules at any time he has the leisure so to do. That he may enter his rules at any time is shown by the fact that the Court will enter an order that he entered them nunc pro tunc when there has been an omission of this ministerial duty on his part.

Apparently Judge McDowell's opinion is correct. His remark that "the returning of a writ of summons is a requirement that is not made in the interest of the defendant but in the interest of the plaintiff" is most pertinent and presents the question in a light in which the writer had never before viewed it.

From Judge Burks' address on the new Code, 5 Va. L. Reg. (N. S.) 97, 121, the question will still be debatable when that Code goes into effect. Judge Burks in his address, supra, says:

"Section 3220, of the Code of 1887, enacts that all process shall be returnable to the court on the first day of the term, or in the Clerk's office to the first day of any rules. As no good reason is seen for requiring process to be returnable to the first day of the term, the new Code provides that it may be returnable to *some* day of the term of a Court, or in the Clerk's office to the *First* day of any rules."

It will be noted that the new Code changes only the previous law in so far as process is returnable to a term of court, and as before we have as to rules—returnable to first day of any rules, with the doubt unremoved as to whether *"returnable"* means *"returned."*

The writer has not overlooked the case of Moorman *v.* Supervisors (Va.), 92 S. E. 834. In view of the peculiar wording of Sec. 3577, which supports that decision, that case is not considered in point when seeking an interpretation of Sec. 3220.

BRADFORD WATERS,
of the Lynchburg Bar.